Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-309

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PHILLIP W. HOUGHTON
and
F. RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner McDonnell Douglas Corporation, defendant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed on April 20, 1977, as amended on June 1, 1977.

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri are reported at 413 F.Supp. 1230 and reproduced in Appendix A, *infra*. The opinion and judgment of the Court of Appeals filed on April 20, 1977, are reported at 553 F.2d 561 and reproduced in Appendix B. The Order of the Court of Appeals filed on June 1, 1977, modifying its opinion and denying rehearing, is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1977, and a timely petition for rehearing was denied on June 1, 1977. This petition was filed within 90 days of June 1, 1977. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents several important and recurring questions under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*:

(1) Does an employer sustain its burden of proving that age is a bona fide occupational qualification for a given job by showing that it has a rational basis in fact to believe that with increasing age there is an increase in the likelihood of risk and harm, or is he required to experiment with safety by continuing to employ older persons in hazardous jobs until they either fail their physical examinations, suffer an accident or voluntarily retire?

(2) Is age a bona fide occupational qualification for the job of solo test pilot of a high-performance supersonic jet fighter airplane?

(3) Does an employee who claims he is the victim of discrimination have an obligation to attempt to mitigate his damages?

STATUTE INVOLVED

The case involves construction of the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") and in particular § 4(f)(1) thereof, 29 U.S.C. § 623(f)(1):

> "It shall not be unlawful . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business or where the differentiation is based on reasonable factors other than age . . ."

STATEMENT OF THE CASE

In 1971, respondent Houghton, then age 52, was removed from his status as a production test pilot flying petitioner's supersonic jet airplanes. At the time of his removal, he was the oldest pilot ever to fly for petitioner in that position, and he was grounded only after several years of unsuccessful efforts by petitioner to persuade him to take another position (Apdx. 607-09, 612-15).[1] Following his removal from flying status, he was retained as manager of production flight operations and was offered numerous other positions within the Company (Apdx. 80-88, 102-03). He scorned these other opportunities, failed to perform his job and was eventually fired in December 1972 (Apdx. 82, 111, 169, 621-25). Following his termination, Houghton made no effort whatsoever to find another job and, amazingly, still had not made any such effort at the time of trial (Apdx. 112-13, 1392).

In this lawsuit, Houghton alleged that he was the victim of age discrimination under the ADEA, and respondent Secretary of Labor was permitted to intervene on his behalf. The Company acknowledged that Houghton was grounded because of his age but contended that age was a bona fide occupational qualification (BFOQ) for the test pilot job under the Act. The Company denied that Houghton's eventual firing was inspired by his age but contended that it was precipitated by his unproductive performance in his nonflying position.

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[1] The evidence showed that petitioner's Vice President who made the decision to remove Houghton had an extensive background in flying and had in fact grounded *himself* at age 44 (Apdx. 607, 615-17). Hence, although the Company's decision may have been based on "intuitive judgment," that intuition was derived from years of personal experience and observation.

The Job

The job in question here, *i.e.*, that of production test pilot, involves test-flying one of the world's most sophisticated high-performance military fighter airplanes through a series of prescribed tests and maneuvers prior to delivery to the United States Government. In many instances, the plane has never been flown before, and the pilot is alone in the cockpit without a co-pilot or another person capable of flying or landing it. Flights begin and end at the St. Louis commerical airport, and portions of the flights commonly occur over densely populated areas with attendant dangers to the general population in the event of an accident or a faulty takeoff or landing (Apdx. 154-56).

The principal plane produced and tested by petitioner since 1960 has been the F-4 Phantom, which takes off and lands at a speed of approximately 170 miles-per-hour and accelerates at 780 miles-per-hour per minute. Its level flight speed can exceed twice the speed of sound (more than 2,000 feet per second), and it can climb from sea level to 35,000 feet in 2½ minutes (Apdx. 149-51, 291-92).

In testing the plane, the pilot must perform a great number of tasks, some of which are quite complex. In addition to testing the maximum capabilities of the aircraft and reacting instantaneously to emergencies, he must, *inter alia*, close on a friendly target at a rate in excess of 1,000 miles-per-hour and fly over a rolling terrain in an attempt to maintain a constant altitude of 250 feet at speeds up to 550 miles per hour. He is frequently required to endure as much as 5 "G's," and it is beyond question that he undergoes severe physical, mental and psychological stresses during the test flight (Apdx. 133-44, 602-04).

Evidence Concerning the Effects of Aging

The medical effects of age and aging, as they affect the population in general and pilots in particular, were the subject of considerable expert testimony in this case. It was undisputed that aging inevitably results in progressive deterioration in all physiological functions in all human beings until death and that no one is immune from the aging process (Apdx. 268, 294, 1223-27, 1301). Among the effects of aging which are most deleterious to a pilot are a diminution in reaction time and in resistance to fatigue, as well as numerous other age-related deteriorations which are simply not detectable (Apdx. 268-86, 755-98, 1223-27). In addition, of course, the risk of sudden incapacitation also increases with age (Apdx. 1104, 1273). Petitioner's two well-qualified expert witnesses both concluded that age is indeed a BFOQ for the job of production test pilot (Apdx. 287-300, 479-87). One expert stated that no one should be permitted to engage in test flying after age 50 and that he "would be very much happier to see it at 45" (Apdx. 300, 308). The second expert "would prefer to see them phased out at the age of 40" (Apdx. 497). Both concurred that the removal of Houghton at age 52 was reasonable and amply justified by safety considerations (Apdx. 365, 496).

While generally agreeing with this medical analysis, respondents' experts challenged the conclusions and contended that the employer should be required to measure "functional" or "physiological" age, rather than merely relying upon chronological age. Although it is universally acknowledged that there are no accurate tests available to determine a pilot's "functional" or "physiological" age with any degree of reliability (Apdx. 418-22, 503-05, 858-60, 904-05, 1010-11), respondents' witnesses even claimed that a 102-year-old pilot could not be grounded if he could pass a physical examination (Apdx. 842-44). These opinions were offered despite the experts' previous

statements that "I am not qualified to determine whether someone can fly or not" and it is "most precarious to essentially equate performance in the laboratory to performance in the cockpit" (Apdx. 858-62, 1600, 1605).[1a]

Age Restrictions in Flying

Petitioner also introduced empirical studies indicating that older pilots are "more at risk" and that the accident rate among pilots increases sharply after age 49 (Apdx. 299-300, 1618, 1636-39). As a result, the Federal Aviation Administration has imposed a mandatory retirement age of 60 on all commercial pilots subject to its jurisdiction. 14 C.F.R. § 121.383. The age-60 rule is unequivocally endorsed by the medical profession and has repeatedly been upheld by the courts as being justified by the increase with age of the risk of sudden incapacitation from unpredictable heart attacks and strokes. See *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Air Line Pilots Association International v. Quesada*, 182 F.Supp. 595 (S.D.N.Y. 1960), *aff'd*, 276 F.2d 892; *Chew v. Quesada*, 182 F.Supp. 231 (D.D.C. 1960). The FAA recognizes that medical science does not have "any means of accurately determining the physiological age of any specific individual nor is there any reliable method of predicting accurately the occurrence of sudden incapacitation due to heart attacks, strokes or debilitating seizures . . ." *Air Line Pilots Association International v. Quesada, supra*, 182 F. Supp. at 597. In 1971, the FAA refused to revoke or modify the age-60 rule and specifically rejected the very arguments relied on by respondents in this case:

[1a] Respondents' experts recognized that certainty is unattainable in these matters and that judgments are therefore necessarily and properly based upon a "*feeling* about this individual's capability to do the job" (Apdx. 1328).

". . . an increase in the number of medical examinations administered to a given pilot, as suggested by some of the testimony presented at the hearing, would not be an effective deterrent to incapacitation inasmuch as the indices of such incapacitation are not now sufficiently developed" (Apdx. 1615).

The hazards of sudden incapacitation are significantly more pronounced for production test flights than for the flights covered by the age-60 rule because, among other things, a test pilot flies without a backup pilot (Apdx. 296-97, 1349).

Similarly, the U.S. Navy has medical regulations to the effect that no one over the age of 45 may fly solo or as pilot-in-command without a waiver (Apdx. 1522). The National Aeronautics and Space Administration has always had a maximum age for astronaut candidates, designed to retire them from the flight program at about age 50 (Apdx. 1332-36). Congress itself has recognized the safety implications of air travel by requiring air traffic controllers to retire at the age of 56. 5 U.S.C. §8335(f). Moreover, both the legislative history of the ADEA and the Labor Department's own regulations have recognized that age would be a BFOQ for pilots.[2]

The District Court's Opinion

Following nine days of testimony limited to the issue of liability, the trial court filed a comprehensive Opinion embodying 56 detailed findings of fact. The court found that Houghton's removal from flight status was based upon "the defendant McDonnell's good faith determination that his continued employment as a test pilot would be an increased safety risk due to

[2] See Hearings Before the Senate Subcommittee on Labor, 90th Congress, 1st Sess. pp. 24-25, 52; and 29 C.F.R. § 860.102.

plaintiff Houghton's age" (A-8, *infra*). The court also found, on the basis of the evidence presented, that the risk of sudden incapacitation with age is frequently unmeasurable and that "functional" age cannot be determined with sufficient reliability to meet petitioner's obvious safety obligations. Finally, the court said:

> "It is clear to the court sitting as the finder of fact in this bench tried case that age is a bona fide occupational qualification for the job of production test pilot and that defendant McDonnell had justification for removing plaintiff Houghton as an unacceptable safety risk due to his age of 52" (A-13).

The court also found that petitioner had made every effort to find another suitable job for Houghton but that Houghton's "continuing refusal to accept any job other than one involving flying forced [petitioner] to terminate [Houghton] for good cause" (A-20).

The Court of Appeals' Opinion

In a terse opinion filed April 20, 1977, a three-judge panel of the Eighth Circuit summarily swept aside the findings of the district court and, without ruling any of them to be clearly erroneous, reversed the judgment of the district court and ordered petitioner to reinstate Houghton as a test pilot if he is "still physically capable." In its abbreviated Opinion, which evidenced a disturbing unfamiliarity with the record, the Court completely ignored (a) the safety factors, (b) the requirements of the job and (c) all of petitioner's evidence and the findings of the district court. Confusingly, the panel said, "While we find no quarrel *per se* with the BFOQ test, we do not believe it controls here"(A-24). The court effectively held that since Houghton has passed his physical exam, he must be permitted

to continue flying if petitioner cannot show that his next flight is likely to be unsafe.[3]

The Court of Appeals then ruled that Houghton was justified in refusing to perform any non-flying job and that he was entitled to back pay for the entire six-year period since his grounding, even though he had *never even sought* other employment. The district court was also ordered to put Houghton, who is now 58 years old, back in the cockpit if he is found "still physically capable."

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[3] Among the more amazing statements in the Court's original opinion, some of which were modified on denial of rehearing, were the pronouncements (a) that "medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy"; (b) that the likelihood of disability resulting from age is "highly remote"; and (c) that older pilots are safer than younger ones (A-25).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has effectively held as a matter of law (a) that age is an impermissible consideration when a company is deciding who should fly a brand new, previously untested multi-million dollar supersonic jet airplane at speeds of 1,400 miles-per-hour over densely populated areas; and (b) that such a company would have no rational justification or legal right to remove even a 64-year-old man from the cockpit as long as he could pass his physical examination each year.

The Eighth Circuit opinion is as alarming as it is unprecedented. It is the first decision by any appellate court in this country requiring an employer to experiment with safety. All other courts which have considered the difficult problems created by aging in hazardous occupations have deferred to the employer's judgment if it has a reasonable basis in fact and experience. Accordingly, age restrictions for bus drivers, policemen and highway patrolmen have been upheld, even though the potential harm which could result from age-induced health problems on those jobs is insignificant in comparison to the cataclysm which would follow from the incapacitation or other age-related failure of a test pilot.

The Court of Appeals has departed dramatically from the philosophy of the ADEA and has distorted the will of Congress in an ever-burgeoning area of the law. It has misperceived the societal values at stake in this case and has effectively abrogated the BFOQ defense. Accordingly, this Court should review the judgment below.[4]

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[4] The Eighth Circuit's judgment takes on added significance in light of the facts that (a) Government employees are now covered under the ADEA until age 70 (5 C.F.R. § 713.501), and (b) legislation has been proposed (H.R. 5383 and S. 1784) to extend coverage of private employees until age 70.

I. The Burden of Proof Imposed Upon Petitioner by the Eighth Circuit Conflicts With the Rules Established by the Fifth and Seventh Circuits and Effectively Abrogates the BFOQ Exception From the ADEA.

Although there is no dispute about the fact that the employer has the burden of showing that age is a BFOQ for the job in question, the various courts of appeals have disagreed as to what must be proven to sustain that burden. Despite the different formulations, both the two prior leading cases under the ADEA had vindicated the employer's judgment that age is a BFOQ for over-the-road bus drivers. In this case, however, the Eighth Circuit completely repudiated one of the previous burden-of-proof rules and perverted the other, thereby distorting the purpose of the ADEA and imposing upon petitioner and other employers an impossible and unworkable standard.

The Seventh Circuit first tackled the burden-of-proof issue in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 862-63 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). There the Court, quoting from a Tenth Circuit opinion involving airline pilots,[5] held that safety was essential to the company's business and that

> ". . . when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. . . . *The job of airline flight officer is clearly such a job.* . . . The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job." (Emphasis added.)

[5] *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).

In *Greyhound*, the Seventh Circuit, noting the "compelling concerns for safety" involved in driving a bus, held that the defendant company was not required to show that all or substantially all bus driver applicants over the age of 40 could not perform safely. Rather, the company was only required to demonstrate "that it has a rational basis in fact to believe" that the hiring of older drivers would "increase the likelihood of risk and harm to its passengers." *Id.* at 863. The court further expounded on the extent of the showing required of the employer:

> "Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice. . . . Greyhound need not establish its belief to the certainty demanded by the Government and the district court *for to do so would effectively require Greyhound to go so far as to experiment with the lives of passengers.* . . ." *Id.* at 863, 865. (Emphasis added.)

The Fifth Circuit modified the *Greyhound* rule somewhat in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). The court in *Tamiami* incorporated certain burden-of-proof concepts from sex discrimination cases, even though the Seventh Circuit in *Greyhound* had rejected the suggestion that sex discrimination principles are freely transferable to age cases. The rule emanating from *Tamiami* requires an employer to show (1) that it has a factual basis for believing that its business operations (safety obligations) would be undermined in the absence of an age restriction, and further to show either (2a) that it has reasonable cause, that is, a factual basis for believing that all or substantially all persons over the specified

age limit would be unable to perform safely and efficiently the duties of the job OR (2b) that some older persons have characteristics that prevent them from safely performing the job and that it is impossible or impracticable to deal with such persons (*i.e.*, to identify them with any degree of certainty and without undue hardship) on an individualized basis. 531 F.2d at 227-28, 235-36. After analyzing evidence very similar to that adduced in the instant case, the *Tamiami* court, noting that employers must be given substantial discretion where safety is concerned, said, *l.c.* 238:

> "Whatever might have been our finding were we deciding this issue *de novo*, the District Court found that examinations cannot detect the relevant physiological and psychological changes 'with sufficient reliability to meet the special safety obligations of motor carriers of passengers.' . . . This is a finding of fact and therefore may not be set aside unless 'clearly erroneous.' "

Under either the *Greyhound* or the *Tamiami* rationale, the judgment of the fact-finder in this case would have to be affirmed. Nonetheless, the appellate panel, in flagrant contravention of the "clearly erroneous" provisions of Rule 52(a), discarded all the district court's findings. Ignoring *Greyhound* altogether, the court paid lip service to *Tamiami*, but it twisted the *Tamiami* rule into a holding that evidence about *all* older people was insufficient because it did not exclusively focus on the particular type of employees involved, *i.e.*, pilots. In addition to the fact that there *was* an abundance of evidence relating to piloting, both common sense and *Tamiami* itself refute the notion that general medical testimony cannot form a "factual basis" for a BFOQ defense. The Eighth Circuit has in effect held that Houghton's ability to pass his physical examination was the only relevant factor and that because the Company had not proven that his next flight might result in a crash, it had no justification for removing him from the flight line.

The decision below is also contrary to this Court's ruling in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), which upheld a state statute requiring the retirement of uniformed state police officers at age 50.[6] A three-judge district court had declared the statute unconstitutional on the grounds that a "classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." This Court, however, reversed in a 7-1 *per curiam* decision. In the course of its opinion, the Court noted that "there is no dispute that, when he retired, [appellee's] excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer." The testimony in *Murgia* had established the effects of age and the physiological and psychological demands of the policeman's job which, though "arduous," were considerably less stressful than those facing a test pilot. Based on the fact that the risk of physical failure increases with age, the Court held that "mandatory retirement at 50 serves to remove from police service those who fitness for uniformed work presumptively has diminished with age." *Id.* at 315.

It is incomprehensible that in the case at bar the Court of Appeals could have ruled as it did without even a single mention of safety or the requirements of the test pilot's job. From all that appears in the appellate court opinion, Houghton could have been flying a Piper cub with several backup pilots at his disposal. Every administrative tribunal and court which has previously analyzed the contentions advanced by respondents in this case has summarily and definitively rejected them. But the Eighth Circuit, by imposing an impossible and irrational burden upon employers, has transgressed far beyond the Congressional purpose in enacting the ADEA and has virtually invited new

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[6] While *Murgia* involved an equal protection claim rather than the ADEA, this Court has noted in comparable circumstances that equal protection analysis is "quite relevant" in statutory discrimination cases. See *General Electric Company v. Gilbert*, 429 U.S. 125, 133 (1976).

challenges to the FAA's age-60 rule and to other perfectly sound and necessary age restrictions.

Congress never purported to *eliminate* age as a factor in employment decisions but sought only to prohibit *arbitrary* age discrimination. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 372 (8th Cir. 1974); *Hodgson v. First Federal Savings & Loan Association of Broward Co., Fla.*, 455 F.2d 818, 820 (5th Cir. 1972). The effect of the opinion of the Court of Appeals, however, is to strip this petitioner and others in similar industries of the power to make an informed judgment, based on experience, available data and prevailing medical thought. They have been forbidden from taking advisable precautions regarding employees who have reached an age at which a substantial majority of knowledgeable experts firmly believes that there is an increased safety risk. Petitioner is being required to experiment with lives and with airplanes worth $20,000,000 apiece. We earnestly submit that if age is not a BFOQ for this job, there is no such thing as a BFOQ. The frightening implications of the Eighth Circuit's judgment call for review by this Court.

II. The Eighth Circuit's View of the Discharge Issue Will Encourage Litigation and Malingering.

Following the dismissal from flight status, Houghton was offered a choice of jobs virtually anywhere in petitioner's nation-wide company, including its California and Florida facilities. He absolutely refused to perform any job other than flying and remained uncooperative and unproductive. Eventually, petitioner had no choice but to fire him. Houghton admitted that he had never sought any other job and has not worked a single day since his discharge.

Although the opinion below is garbled in this regard, it can be read as approving Houghton's behavior and as requiring petitioner to make him whole for the entire period of time since

his grounding, even though he refused to accept alternative employment and completely failed to mitigate his damages. That holding is injudicious and at odds with scores of other decisions. See, *e.g.*, *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975) *vacated on other grounds*, 45 U.S.L.W. 3789 (1977); *Jurinko v. Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir. 1973) *vacated on other grounds*, 414 U.S. 970 (1973). The Eighth Circuit's reasoning would seem to apply to all claims of discrimination, whether based on age, race, sex or otherwise. It will encourage obdurate behavior and will induce grievants to malinger in hopes of increasing their eventual damage awards. Such is hardly the purpose of the ADEA or any other anti-discrimination legislation.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court
E. D. Missouri
Eastern Division

Phillip W. Houghton, Plaintiff, and W. J. Usery, Jr., Secretary of Labor, United States Department of Labor, Intervenor-Plaintiff, vs. McDonnell Douglas Corporation, Defendant.	No. 73 C 14(3).

May 14, 1976

Memorandum

WANGELIN, District Judge:

This matter is before the Court for a decision on the merits after a trial to the Court sitting without a jury. The case at bar was brought pursuant to the Age Discrimination and Employment Act, 29 U.S.C. § 621, et seq., (hereinafter ADEA). The Court being fully advised of the premises hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, Phillip W. Houghton, was born October 1, 1919, and now resides in St. Louis County, Missouri.

2. The Intervenor-Plaintiff is the Secretary of Labor, of Washington, D. C.

3. Defendant, McDonnell Douglas Corporation, (hereinafter McDonnell) is a corporation, organized and existing under the laws of Maryland, having its principal office and place of business in the State of Missouri. At all relevant times, defendant has had twenty or more employees for each working day and each of twenty or more calendar weeks.

4. Defendant McDonnell is engaged in the manufacture and sale of high performance military aircraft to the government of the United States and other foreign states.

5. The high performance aircraft produced by McDonnell include the F-4 Phantom, which is a military fighter aircraft. This aircraft has been produced by defendant in various models since 1958. During the period since 1960 the F-4 Phantom was almost exclusively the only high performance aircraft in production by the defendant.

6. The F-4 is still in production by the defendant and has the capability, at certain altitudes, of reaching speeds in excess of twice the speed of sound (Mach 2), and is generally flown by a single pilot with a radar observer/weapons officer in the rear seat.

7. Defendant McDonnell also presently produces the F-15 Eagle, which is also a military fighter aircraft similar to the F-4. The F-15 is a single seat high altitude interceptor. The design and technology of the F-15 represents a significant advance over the design and technology employed in the production of the F-4.

8. The F-4 has the following characteristics of performance:

a. It accelerates from zero miles per hour to one hundred seventy (170) miles per hour take-off speed in ten (10) seconds using seventeen hundred (1700) feet of runway, and after gear and flap retraction it can accelerate at a rate of seven hundred eighty (780) miles per hour per minute.

b. It climbs from sea level to an altitude of thirty five thousand (35,000) feet in two and one-half minutes from brake release.

c. In level flight, depending on the altitude and temperature, the aircraft speed may exceed twice the speed of sound (Mach 2), or over two thousand (2,000) feet per second.

d. At maximum level flight speed enclosing on another object on a collision course, the rate of closing speed is one thousand four hundred and forty (1440) miles per hours, or two thousand eighty (2,080) feet per second, or a similar aircraft on a head-on collision course, the closing speed would effectively be two thousand eight hundred and eighty (2,880) miles per hour, or four thousand one hundred and sixty (4,160) feet per second.

e. The aircraft's landing speed is approximately one hundred eighty (180) miles per hour.

9. Defendant McDonnell employs three categories of test pilots: Experimental, Engineering and Production. As of January 1, 1972, defendant listed fifteen test pilots on its test pilot roster, including plaintiff Houghton. Of these pilots, nine were Experimental test pilots, four were Engineering test pilots, one was a Production test pilot, and the last, Houghton, was Chief Production test pilot.

10. Of the three categories of test pilots, the duties of an Experimental test pilot are the most demanding. An Experimental test pilot must be qualified to perform experimental

and production testing and must be able to use engineering abilities while performing a series of prescribed tests and maneuvers on new types or research models of aircraft on their initial flights, including:

a. Flights evaluating aircraft performance.

b. Development flights expanding the limits of the aircraft flight or design envelope,[1] or weapons system.

c. High risk flights demonstrating structural integrity, control system modifications, maneuverability, missile/gun firing, etc.

11. An Engineering test pilot is required to pilot test aircraft through a series of prescribed test and maneuver in order to determine compliance with engineering specifications during subsystem development tests such as auto-pilot, flight control, radar and electronic navigation, weapons systems tests, engine tests, and other development flights.

12. A Production test pilot is expected to use engineering abilities while piloting recently assembled production aircraft through a series of prescribed tests and maneuvers in order to functionally evaluate items such as air frame, navigation and radar systems, power plant and other items, for final company acceptance before delivery to the customer.

13. A typical production test flight consists of take-off, flight to the testing area and return to the St. Louis airport within a time of approximately one hour and fifteen minutes.

14. In many instances the plane being flown has never been flown before the production test flight.

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[1] Flight or design envelope is an aeronautical term of art which describes the predicted characteristics and performance of an aircraft when operated in the manner designed.

15. The test pilot flies the aircraft without a co-pilot or other person capable of flying or landing the aircraft.

16. Portions of the flight commonly occur in the vicinity of a major city with the attendant dangers to the general population in the event of an accident or crash.

17. In beginning and ending a production test flight, pilots fly over heavily populated areas of the City and County of St. Louis.

18. During a production test flight, the pilot is required to undergo a brief two to three second acceleration of approximately 5 "Gs"[2] pull up to check the structural integrity of the aircraft, plus one brief pull-up of approximately 4 "Gs" to observe the disengagement of the auto-pilot system.

19. The production test flight also includes in addition to the acceleration tests, a level speed run approaching twice the speed of sound (Mach 2) to verify the integrity of the air frame and proper operation of the engines at supersonic speeds.

20. The Production test pilot is also expected to conduct a radar intercept test which consists of closing upon a friendly

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[2] The term "G" refers to the normal gravitational acceleration placed upon an object located at sea level on the earth's equator. The maneuvers of a Production test pilot which require him to accept accelerations in excess of one "G", have the eeet of making the pilot feel as though he weighed more than he actually does. For example, a pilot experiencing the acceleration of 5 "Gs" would feel as though he weighed five times his actual body weight. The effect of acceleration, depending upon the vector of the acceleration to the pilot, results in the pointing of blood in certain parts of the body, and depriving other parts of the body of a blood supply. A common effect of high acceleration is a "gray-out, or a red-out", both of which can significantly affect the visual accuity and mental ability of the person who is undergoing the acceleration. Production test pilots wear "G" suits which increase their tolerance to acceleration by approximately two "Gs" by preventing excess blood flow away from the upper part of their body during maneuvers requiring high acceleration.

target at a rate in excess of one thousand miles per hour. The Production test pilot must also be able to fly over rolling terrain and attempt to maintain a constant altitude of two hundred fifty (250) feet above the earth at speeds up to five hundred fifty (550) miles per hour or eight hundred (800) feet per second.

21. During the production test flight, the pilot is required to perform a great number of tasks ranging from relatively simple to highly complex. The pilot must maintain visual alertness for objects or other aircraft, which may or may not occur while flying above overcast cloud cover and against a constant color sky background, thereby eliminating a horizon reference with a resulting loss of equilibrium. In addition the pilot must monitor, but not simultaneously, approximately twenty different systems aboard the aircraft involving forty different instruments relating to the performance and flight of the aircraft.

22. All test pilots may be called on occasion to conduct ferry flights, the delivery of totally accepted aircraft by the customer, which may involve long flight hours with in-flight refueling.

23. A Production test pilot must perform his duties under conditions of psychological and physiological stress which may be caused by one or more of the following factors:

a. Factors beyond the pilot's control such as delay in preparation of the aircraft for flight or bad weather, frequently postponed production test flights for hours or days, resulting in frequent reminders by management that there may likewise be delay in meeting delivery schedules.

b. In testing the air frame and engines during the production test flight, the pilot must approach maximum limit design dynamic pressures during high speed flight and maximum lift coefficient during maneuvering flight at high altitudes.

c. Test flight of such high performance fighter aircraft require an extremely high degree of concentration. Weather conditions may cause concern because of their bearing on the test pilot's ability to complete his mission, and in the event of a long ferry flight for delivery to a customer, to effect a timed rendezvous for in-flight refueling, and to reach and land at his final destination.

d. Immediately following a production test flight, pilots undergo oral debriefings with technical experts lasting up to thirty minutes, and then must make written discrepancy flight reports.

e. At certain times cockpit conditions, in terms of heat and noise, may be quite uncomfortable.

24. After World War II service as a pilot, flying P-51 aircraft, plaintiff Houghton, then 27 years old was employed by McDonnell as an Assistant Aerodynamicist. In 1951, he became a Production test pilot, and in the same year was promoted to Experimental test pilot.

25. At the age of 37, in 1956, plaintiff Houghton ceased his activities as an Experimental test pilot and became Chief Production test pilot, in which position he remained until March, 1972.

26. The position of Chief Production test pilot requires, in addition to the Production test pilot duties, heretofore described, the responsibility for production and flight operations and the functional supervision of Production test pilots.

27. Due to a declining production rate, defendant McDonnell found it necessary to reduce its pilot staff in order to provide each pilot with the amount of proficiency flying required by Air Force Regulation 55-22.

28. In July of that year, plaintiff Houghton was first informed by management of defendant McDonnell of the need to reduce

the staff of approximately fifteen pilots and to transfer plaintiff Houghton from that staff. Plaintiff Houghton expressed opposition to such a plan.

29. Plaintiff Houghton was told by defendant's Vice President for laboratory and flight development, William S. Ross, that Houghton would be removed from flight status on December 31, 1971.

30. In 1971, plaintiff Houghton was almost four years older than any other test pilot who had ever flown for defendant McDonnell.

31. Plaintiff Houghton's removal from flying status was made on the above date upon the defendant McDonnell's good faith determination that his continued employment as a test pilot would be an increased safety risk due to plaintiff Houghton's age.

32. The precise timing for the removal of plaintiff Houghton from flight status was required by the necessary reduction in staff due to a declining production rate.

33. The defendant had been trying to persuade plaintiff Houghton to accept a non-flying job for several years due to defendant McDonnell's good faith concern over increased safety risks due to the plaintiff's age.

34. When plaintiff Houghton was advised of his removal from flight status, defendant McDonnell offered him a position as flight safety engineer, supervising the systems engineering section and also tendered another position in the flight simulation department. The plaintiff was also offered the opportunity to pick a suitable job anywhere in the entire company, including its California and Florida facilities.

35. In mid-December of 1971, Vice President Ross asked planitiff Houghton about his job hunting efforts, and was advised

by the plaintiff that both the flight safety and flight simulation jobs were "unacceptable". The plaintiff also stated that he was going to resign from the Company. Vice President Ross urged him to reconsider and gave plaintiff Houghton four weeks vacation and also four weeks leave of absence.

36. In early March of 1972, plaintiff Houghton told Vice President Ross he had not found employment inside or outside defendant McDonnell and again rejected the flight safety position. Ross stated that plaintiff Houghton could remain in the test pilot department indefinitely, at the same base pay, as manager of Production flight operations (effectively becoming a non-flying Chief Production test pilot). Plaintiff Houghton was unenthusiastic about that suggestion.

37. Although he had not flown since December 31, 1971, plaintiff Houghton's flight pay was not terminated until the end of March.

38. Shortly after the previously discussed March, 1972, meeting, Vice President Ross again suggested the flight safety job, after which plaintiff Houghton reiterated his desire to continue flying. The plaintiff was of the opinion that there was no job which was a "adequate substitute in both job appeal and salary". The only specific job which plaintiff Houghton would "probably accept" was a corporate vice presidency.

39. Plaintiff Houghton became increasingly unhappy and resentful during 1972 as a result of his removal from flight status. His superiors observed that he was becoming a disgruntled employee. The plaintiff conceded that he resented some of the duties assigned to him and refused to perform them. Defendant McDonnell considered his nine months as Manager of Production Flight Operations to be nonproductive.

40. In response to plaintiff Houghton's attitude, defendant McDonnell determined to assign him to a specific productive job. Plaintiff Houghton was told on December 8, 1972, that

he was being transferred to the flight simulation department. On December 12, 1972, plaintiff Houghton refused to accept the transfer. His employment was therefore terminated. Following his dismissal from defendant McDonnell, plaintiff Houghton has never made an effort to find another job.

41. Houghton was not discharged because of his age, but was rather discharged due to non-satisfactory performance of his job and his refusal to accept another position for which he was qualified.

42. Notice of intent to file this action was given to the Secretary of Labor within 180 days after the alleged unlawful practice occurred and at least 60 days before the filing of this action.

43. Plaintiff Houghton and intervenor-plaintiff Secretary of Labor brought this suit alleging that defendant McDonnell which had employed Houghton as a test pilot, removed him from flight status, reduced his salary and terminated his employment in violation of the ADEA. Both plaintiffs also charged that defendant discriminated against Houghton "with respect to his compensation, terms, conditions and privileges of employment", because of his age in violation of 29 U.S.C. § 623(a)(1). The Secretary also alleged that defendant McDonnell limited, segregated or classified Houghton in a way which deprived or tended to deprive him of employment opportunities and otherwise adversely affected his status as an employee, because of his age, in violation of 29 U.S.C. § 623(a)(2).

44. Defendant McDonnell admitted removing plaintiff Houghton from flight status because of his age but contended that this action was taken because age is a bona fide occupational qualification (hereinafter BFOQ) reasonably necessary to the normal operation of defendant's business as permitted under 29 U.S.C. § 623(f)(1). Defendant also admitted terminating

Houghton's employment but contended that this action was not taken because of his age but was based upon reasonable factors other than age and was "for good cause," as permitted under 29 U.S.C. § 623(f)(3).

45. To aid the Court in determining whether or not age is a bona fide occupational qualification for the job of test pilot, all parties submitted to the Court an abundance of expert testimony and evidence, showing the effect of aging and the relationship of physiological to chronological age. The Court finds no one view of any expert provided by any party to be totally credible. The conclusions of the Court with regard to the physiological process of aging and its relation to physiological age and chronological age are the result of a synthesis of the Court sitting as the trier of fact.

46. Aging is a loss of function, a loss of ability at a particular time to meet the particular demands of a person's environment. Such changes begin in man in the early twenties, and inevitably result in a progressive deterioration in all physiological functions in all human beings until death. Progressive changes in the human system result as part of the aging process, lessening the functions of the blood vessels, cells and organs. These changes occur in the thirties and increase in the forties to the point that anyone over the age of fifty is showing certain signs of aging, and in general those over the age of sixty can be said to have aged. All organs and systems of the body are subject to this inevitable aging process which ultimately results in death. No one is immune from this aging process although different people certainly are affected at differing rates by the aging process.

47. With the onset of the aging process, certain physiological changes may or may not take place at different times. It may be said that all the following changes will occur to the general population as they age:

a. Reaction time slows and the ability to respond diminishes with regard to complex or new tasks performed under time pressure or other stress.

b. There may be a loss of vision.

c. There is a possibility of reduction of hearing acuity.

d. There are changes in blood vessels which impair function or adaptation to stress.

e. There is a decrease in respiratory function and efficiency.

f. Resistance to fatigue decreases with age, strength will tend to diminish with age, and the basal metabolic rate decreases with age.

48. Such age related deteriorations are not always detected or even detectable. Degenerative changes of the circulatory and nervous systems cause subtle changes in reaction time, memory and personality which may or may not be detectable, but any one of which may gradually predominate and cause mistakes in judgment with regard to vehicle control responsibilities. Some pilots will suffer these changes before the age of sixty.

49. As age increases so does the risk of sudden incapacitation. The progressive deterioration with age of physiological and psychological functions results in the possibility of significant medical defects. The incidence of sudden incapacitation due to these medical defects increases with age, but cannot be predicted with any accuracy in individuals.

50. Plaintiff Houghton testified at the time of trial that he was as fit as he had ever been, but was forced to concede that aging had taken its toll upon him. He stated that he probably could not withstand six or seven "Gs" for as long a period of time as he did when he was in the Air Force and flying a P-51 fighter aircraft. Plaintiff Houghton also stated that he had a

tendency to become somewhat more fatigued in his flying during his fifties than he had during his thirties.

51. Plaintiff Houghton uses a darkening agent upon his hair to improve his appearance and bring it more in line with what he considers to be his physiological age, which he considers to be somewhere in the forties.

52. The Court finds from the evidence that functional age, as distinguished from chronological age, cannot be determined with sufficient reliability to meet the special safety obligations which are imposed upon defendant McDonnell Douglas.

53. In the absence of a comprehensive test by which an individual's functional age might be determined, there is no alternative to establishing an arbitrary age limit.

54. The Court finds that defendant McDonnell had reasonable cause, in light of the expert testimony adduced at trial by all parties, to believe that plaintiff Houghton, at age 52, would not be able to perform safely and efficiently the duties of a Production test pilot.

55. It is clear to the Court sitting as the finder of fact in this bench tried case that age is a bona fide occupational qualification for the job of Production test pilot and that defendant McDonnell had justification for removing plaintiff Houghton as an unacceptable safety risk due to his age of 52.

56. After consideration of the evidence, the Court finds that plaintiff Houghton's termination from employment was due to the attitude of plaintiff Houghton upon his removal from flight status, and was not in any way based upon plaintiff Houghton's age. Plaintiff Houghton's termination was therefore based on reasonable factors other than age and was "for good cause," as permitted under 29 U.S.C. § 623(f)(3).

Conclusions of Law

This Court has jurisdiction over the parties and subject matter of this litigation pursuant to 29 U.S.C. § 626(c), and all conditions precedent to the filing of this lawsuit have been met by all parties.

The initial question before the Court is the burden of proof imposed upon the parties. As stated in the findings of fact above, defendant McDonnell has admitted that it removed plaintiff Houghton from flying status on the basis of age, but contends that due to the plaintiff's occupation as a test pilot that age is a bona fide occupational qualification for the purposes of the ADEA, 29 U.S.C. § 623(f)(1).

It is the opinion of the Court that there is no uniform burden of proof imposed upon an employer seeking to assert age as a BFOQ due to a difference of opinion between the only two Courts of Appeals to consider this issue. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir., 1974); and *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir., 1976); aff'g sub nom. *Hodgson v. Tamiami Trail Tours, Inc.*, 4 EPD ¶ 7795 (S.D.Fla., 1972).

Both the *Greyhound* and *Tamiami* cases involved the practices of the defendants to refuse to hire anyone as an over-the-road bus driver when the applicant was over the age of thirty five (35) and forty (40) respectively.

The District Court in *Greyhound* found for the plaintiffs and applied the burden of proof of *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir., 1969) which required that a company prove a BFOQ only on the basis of the particular individual involved. The Seventh Circuit reversed the District Court in *Greyhound* and by analogy considered an inter-city bus driver to hold a position akin to that of an airline pilot. Citing *Spurlock v.*

United Airlines, Inc., 475 F.2d 216 (10th Cir., 1972); and *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir., 1971), the Court of Appeals reasoned that since there were more attendant risks to persons other than the party allegedly discriminated against, due to the occupation involved, the employer should bear a lighter burden of proof that age was indeed a BFOQ. 499 F.2d at 863.

The District Court in *Tamiami*, supra, applied the burden of proof of the *Weeks*, supra, decision. The Fifth Circuit in affirming the trial court held that for age to be a BFOQ, the defendant must first overcome the threshold burden of proof eluciated in *Diaz v. Pan American World Airways, Inc.*, supra. Upon overcoming that threshold consideration, the BFOQ test stated in *Weeks*, supra, must then be considered. *Tamiami Tours, Inc.*, at pp. 226-229.

[1] It is the opinion of the Court that the burden of proof elucidated by the Fifth Circuit in *Tamiami*, supra, is the proper test for determining whether or not the defendant has proved that age is a BFOQ for the purposes of the ADEA.

In response to defendant McDonnell's assertion of age as a BFOQ for the occupation of test pilot, all parties submitted expert testimony and voluminous written exhibits on the study of aging. With reference to the credibility of the various witnesses presented by the parties, the Court thinks that the language of Judge Pollack in *Chris-Craft Industries, Inc. v. Piper Aircraft Corporation*, 384 F.Supp. 507 (S.D. N.Y., 1974) is particularly appropriate:

> . . . Not surprisingly, each side charges the other's expert witnesses with internal factual inconsistencies. The Court, in a sense, agrees in the main with both parties . . . The selection and preparation of their experts was obviously carefully orchestrated; indeed, it would be naive to assume

> that the experts were selected and proceeded without regard to the interests of the party who called them. Rather, the record clearly reflects that by and large the experts were result-oriented, a fact which tended to restrict their contribution to something less than a full view . . . 384 F. Supp. at 511-512.

As the Court stated in its findings of fact, its opinion as to whether or not age is a BFOQ is based upon a synthesis of all the evidence presented to it. It is clear that aging is a process which affects in varying degrees all of humanity. The effects of aging result in various physiological changes to the body's tissues and its function. The aging process develops at different rates in different individuals. The evidence adduced at trial indicates that no exact or precise method is available to determine how far advanced the aging process is in any individual, or what the future course of the aging process in that individual will be.

[2] To counter the defendant's assertion that age is a BFOQ for the occupation of test pilot, plaintiff and intervenor-plaintiff have asserted that the proper way to determine whether or not plaintiff Houghton should have been retained on flight status would be by determining his functional or physiological age, rather than relying solely upon his chronological age. As the Court stated in its findings of fact, there is no readily available method which can be used to practically determine the functional age of a person as opposed to his chronological age. There being no practical way to determine plaintiff Houghton's functional age, the Court is of the opinion that defendant McDonnell was clearly acting within its rights to use plaintiff Houghton's chronological age for determining whether or not the plaintiff would be a sufficiently safe test pilot.

It must be noted that intervenor-plaintiff has attempted to assert the chronological/functional age argument with regard to other BFOQ litigation. In *Hodgson v. Tamiami Trail Tours,*

Inc., 4 EPD ¶ 7995 (S.D.Fla., 1972), the District Court stated at p. 6051:

> The evidence has shown that functional age, as distinguished from the chronological age, of a driver applicant cannot be determined with sufficient reliability to meet the special safety obligations of motor carriers of passengers . . .[3] Accord, *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d at 864.

The decision in both *Hodgson v. Greyhound Lines, Inc.*, supra, and *Hodgson v. Tamiami Trail Tours, Inc.*, used the analogy of a bus driver being similar to the pilot of a commercial airliner in that safety decisions must be made rapidly, and that a high degree of care and responsibility were placed upon the bus driver. It does not require a quantum leap in logic to infer that a test pilot operating an aircraft within the far reaches of the flight design envelope[4] is under far more strain than a bus driver proceeding from point to point, or an airline pilot on a normally scheduled and established flight.

It is interesting to the Court that the plaintiff-intervenor has promulgated a regulation found at 29 C.F.R. § 860.102(d) which states for the purpose of the ADEA that age may be a BFOQ "when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit airline pilots to engage in carrier operations, as pilots, after they reach age sixty (60)." The corresponding Federal Aviation Administration regulation may be found at 14 C.F.R. § 121.383(c). The prohibition against an airline

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[3] In affirming the District Court, the Court of Appeals stated: "Medical science could not accurately separate chronological from functional or physiological age." *Tamiami,* supra, at p. 41.

[4] See footnote No. 1.

pilot flying after his sixtieth birthday has been uniformly upheld by the courts as promoting safety in air commerce. *Air Line Pilots Assn., Internat'l v. Quesada*, 286 F.2d 319 (2nd Cir., 1961); and *O'Donnell v. Shaffer*, 160 U.S.App.D.C. 266, 491 F.2d 59 (1974).

Likewise air traffic controllers, law enforcement officers or fire fighters in the employ of the United States government are subject to mandatory retirement upon their reaching the ages of fifty-six (56) and fifty-five (55) respectively, under the provisions of 5 U.S.C. § 8335(f) and (g). The legislative history of 5 U.S.C. § 8335(f) makes it clear that the drafters of that statute were concerned with the toll of the aging process upon air traffic controllers, and the resulting increased safety risk to the general public. 2 *United States Code, Congressional and Administrative News*, (92nd Congress, 2nd Session, 1972) pp. 2288, 2289, 2294 and 2295.

It is clear from the evidence presented to the Court at trial that the ultimate consumers of the airplanes with which plaintiff Houghton tested, namely, the United States Air Force and Navy, tend to restrict their pilots from flying such supersonic aircraft after the age of approximately fifty (50).

[3] It is apparent that if the various agencies and armed services branches of the United States, as discussed above, restrict certain occupations dealing with air safety to persons under a certain chronological age, that age can certainly be a BFOQ under the provisions of the ADEA for this lawsuit.

Defendant McDonnell Douglas was intimately associated with the plaintiff and his flying abilities. It is clear to the Court that defendant McDonnell made a good faith decision based upon the plaintiff's age, that the plaintiff would be a safety risk while acting as a Production test pilot. The defendant's action in removing the plaintiff from flight status is, in the opinion of

this Court, not the arbitrary discrimination which the ADEA was intended to combat. 2. *United States Code, Congressional Administrative News*, (90th Congress, 1st Session, 1967) p. 2225.

As the United States Court of Appeals for the Eighth Circuit recently stated in another case involving the piloting of aircraft:

> . . . The considerations involved literally go to the matters of life and death, both of an individual and his fellows, in the air and on the ground. This is an area into which we will not intrude . . . *Ampleman v. Schlesinger, et al.*, 534 F.2d 825 (8th Cir., 1976).

[4] Using the burden of proof imposed by *Usery v. Tamiami Trail Tours, Inc.*, supra, the Court is of the opinion that defendant McDonnell has carried its burden of proof with regards to establishing age as a BFOQ for the occupation of test pilot under the ADEA. The circumstances which led to defendant McDonnell's withdrawing plaintiff Houghton from flying-status were peculiarly within the knowledge of the defendant, and the Court sees no reason to intervene in the matter, where such age limits are routinely imposed upon other flight or flight related personnel in both more hazardous (i. e., fighter pilots in the armed services) and in less hazardous (i. e., air traffic controllers).

[5, 6] It having been established that age is a BFOQ for the occupation of test pilot, the Court must now determine whether or not plaintiff Houghton's discharge by the defendant was on the basis of age or was "for good cause as permitted under 29 U.S.C. § 623(f)(3)." The evidence clearly shows that the termination of plaintiff's employment was not due to his age but was due to his negative attitude upon his removal from flying status. Defendant McDonnell Douglas in the opinion of the Court, made every effort to find the plaintiff a corresponding

job, but the plaintiff's continuing refusal to accept any job other than one involving flying forced defendant to terminate the plaintiff for good cause. It is clear that an employee may be discharged for good cause at any time, absent discrimination. *Tims v. Board of Education of McNeil, Arkansas*, 452 F.2d 551, 552 (8th Cir., 1971); and *Harper v. Trans World Airlines, Inc.*, 385 F.Supp. 1001, 1004 (E.D. Mo., 1974) aff'd 525 F.2d 409 (8th Cir., 1975).

The Court is aware of the delights of:

> . . . Slipp[ing] the surly bonds of Earth
>
> And danc[ing] the skys on laughter silvered wings . . .
> Magee, *High Flight*.

However, it is equally clear that:

> The Moving Finger writes; And, having writ,
>
> Moves on: Nor all your Piety nor Wit shall lure it back
> to cancel half a line,
>
> Khayyan, *The Rubiat*, E.D. 4 lxx, (Fitzgerald translation).

The refusal of plaintiff Houghton to realize that he would no longer be able to fly as a test pilot for the defendant led to his discharge for good cause.

For the foregoing reasons, the defendant, McDonnell Douglas Corporation, shall have judgment against the plaintiff, Phillip W. Houghton, and the Intervenor-Plaintiff, W. J. Usery, Jr., Secretary of Labor, on all issues.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1652

Phillip W. Houghton,
Plaintiff-Appellant,
and
W. J. Usery, Jr., Secretary of Labor,
United States Department of Labor,
Intervenor Plaintiff Appellant,
v.
McDonnell Douglas Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: February 15, 1977

Filed : April 20, 1977

Before CLARK, Associate Justice,* HEANEY and WEBSTER, Circuit Judges.

MR. JUSTICE CLARK.

Appellant Phillip W. Houghton brought this age discrimination action against McDonnell Douglas Corporation (the Company) following his removal at the age of 52, from the

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* Associate Justice Tom C. Clark, United States Supreme Court (Ret.), sitting by designation.

position of Chief Production Test Pilot and his subsequent termination from the Company's employ. He sued for reinstatement to his former position, an injunction against future discrimination, reimbursement of lost wages, liquidated damages, counsel fees and costs. The District Court found that age is a bona fide occupational qualification (BFOQ) for test pilots and that Houghton was properly terminated due to his inability to adjust to the new non-flying position offered him, thus denying him any relief. Houghton and the Secretary of Labor, who had intervened in the suit, have appealed. We find that the BFOQ is not a controlling test, under the facts here, and that Houghton was improperly terminated from his position as Chief Production Test Pilot. We, therefore, reverse the judgment and remand it for a new trial in accordance with this opinion.

1. **The Facts:** Houghton was hired by the Company in 1946 as an assistant aerodynamicist and in ten years was the Chief Production Test Pilot, a position he held until December, 1972. In July, 1971, the Company found it necessary to reduce its pilot staff due to a declining production rate, and it decided to do so by age. Houghton, as the oldest test pilot in The Company's history, and two other test pilots who were ages 48 and 46, were transferred from flight status. The Company had no set age policy for the transfer of test pilots to nonflying positions, relying solely on "intuitive judgment."

Houghton was offered a choice of placement either in the Flight Safety or Flight Simulation Departments. However, after interviews with the appropriate department managers, he decided that both positions were "very clearly . . . a large step downward . . . in job appeal, job status [and salary]." He advised the Company that neither was acceptable and sought outside employment but failed. He returned to the Company and assumed his former position without flight duties but this, too, was not satisfying. In November, 1972, he was offered a place in the Space Shuttle Simulation Program but rejected it for

similar reasons. Ultimately, Houghton was terminated in December of 1972 for nonproductivity.

At all times during this period, Hougton maintained that the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* was being violated, particularly § 4(a) of the Act which made it unlawful to discharge or discriminate against an employee with respect to compensation, terms, conditions or privileges of employment. This section further provides that to limit, classify or segregate employees or deprive any individual of employment opportunities or otherwise affect his status because of age is unlawful. The Company admitted that Houghton was removed from flight status solely because of his age, but asserted that age was a BFOQ for test pilots under § 4(f) (1) of the Act.

2. **The Evidence:** Houghton was examined by Dr. Womack of the Company's medical staff in October, 1972, and was found to be in good health and medically qualified to fly high performance aircraft. In February, 1975, Houghton was examined by Dr. Proper who found him to be in exceptional physical condition even when compared to pilots and test pilots. He declared Houghton to be 99.9% certain of not suffering a heart attack or stroke while in flight. In support of its case, the Company called two experts who believed that age is an appropriate BFOQ for production test pilots, based on their studies reflecting the physiological and psychological changes that accompany the aging process in the general population. However, each conceded that changes in the aging process occur at diverse rates and varying degrees in different persons. In short, some pilots could fly beyond the age limit proposed, but in the absence of a functional test as to individual capability, an arbitrary age limit was necessary. In this connection, we note that each of the nine fatalities of the Company in the testimony of its planes involved pilots in their thirties.

While the Secretary's expert medical testimony agreed with that of the Company as to the general population, it went on to

show that the aging process occurs more slowly and to a lesser degree among professional pilots. Indeed, the differences between pilots in their twenties and those in their sixties are negligible and wholly insufficient to support an inference of diminished ability among older pilots to adequately perform their work.

Moreover, statistical studies reveal that the accident rate of professional pilots decreases with age. The former Director of Aerospace Safety for the United States Air Force testified that the major cause of accidents is poor pilot judgment, a factor which experience alone can remedy. Further, less than one percent of all aircraft accidents are traceable to medical disability, and of this one percent, the most frequent culprit is gastroenteritis which bears no relationship to age.

Additional documentary evidence indicates that the Air Force, Navy, NASA and the FAA do not restrict healthy pilots in their fifties from flying supersonic aircraft.

Despite this mountain of evidence against the Company's position, the District Court entered a judgment in its favor, finding that age had been satisfactorily proven as a BFOQ for test pilots. While we find no quarrel *per se* with the BFOQ test, we do not believe it controls here. Houghton's ability to continue to qualify as a test pilot must be judged under the provisions of the Act, including § 4(f)(1). In our view, the Company did not meet the burden imposed by the latter section.

3. **The Law of the Case:** First, the Company's admission that Houghton's removal was solely on the basis of his age presents a *per se* violation of § 4(a) of the Act. In attempting to implement the BFOQ exemption of § 4(f)(1), the Company has the burden of proving its actions were within the scope of the exemption. *McCann v. United Air Lines, Inc.*, 542 F.2d 217, 219 n.3 (4th Cir. 1976); *Hodgson v. First Federal Savings & Loan Ass'n*, 455 F.2d 818, 822 (5th Cir. 1972). This burden includes a showing that the Company has a factual basis for believing that

substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the pilot's age. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *see also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). Here, however, the Company's evidence was of a general nature applicable only to the general population. In this regard, it shed little light on the relative capabilities of test pilots as a group to adequately perform their tasks beyond a certain age. Houghton's evidence, however, was of a specialized nature, showing age changes are much slower among test pilots as a group than among the general population. Indeed, there was no evidence that a test pilot's ability to perform his duties, both safely and effectively, was impaired in such manner as to justify the imposition of the arbitrary age limit applied by the Company here. On the contrary, it was shown that medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy. Furthermore, since only one percent of all airplane accidents are traceable to medical problems, and the vast percentage of these being nonage related, it follows that the likelihood of disability simply by age is highly remote. The record reflects that the safety record of the older professional pilots is much better than that of the younger ones due to their experience. To cap the climax, even the Company doctors found Houghton in excellant physical condition, and we note a total absence of evidence which would indicate he was not capable of performing test pilot functions.

To uphold the finding of the District Court in the face of this evidence would "allow the exception [to] swallow the rule." *Weeks v. Southern Bell Telephone & Telegraph Co., supra* at 235. The findings of the District Court to the effect that age constitutes a BFOQ for Houghton are clearly erroneous. *Green v. McDonnell Douglas Corp.*, 528 F.2d 1102, 1107 (8th Cir. 1976).

We note that Houghton claims he was "constructively discharged." However, a constructive discharge generally takes place when an employer makes working conditions so intolerable that the employee is forced to quit. *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975). Houghton did not resign. The motivating cause of his discharge was his insistence upon his statutory rights under the Act. This in itself is an illegal motivating factor on the part of the Company. *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). His illegal transfer from flight status, in the face of his insistence upon his statutory rights, was the root cause of his severance. He is thus entitled to relief.

4. **Relief**: If on remand it is found that Houghton is still physically capable of safely and effectively performing the duties of Chief Production Test Pilot, he must be reinstated in that position, awarded such damages as he has suffered by reason of his discharge, and other relief, including attorney fees, to which he is entitled. In calculating damages, the District Court should appropriately consider the substantially lesser salary Houghton would have earned in the position offered him by the Company and such other factors as it deems relevant.

In the event the District Court finds on remand that Houghton is unable at that time to physically qualify for the position of Chief Production Test Pilot, it should then determine from the evidence when such disability occurred and fix the damages accordingly, including those suffered since such disability, awarding any other relief and damages as deemed appropriate.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

Phillip W. Houghton,
Appellant,
William J. Usery, Jr., Secretary of Labor,
Plaintiff-Intervenor,
vs.
McDonnell Douglas Corporation,
Appellee.

No. 76-1652.

Judgment

(Filed Apr. 20, 1977)

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

April 20, 1977

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 76-1652

Phillip W. Houghton,
Plaintiff-Appellant,
and
W. J. Usery, Jr., Secretary of Labor,
United States Department of Labor,
Intervenor Plaintiff-Appellant,
v.
McDonnell Douglas Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Filed: June 1, 1977

Before CLARK, Associate Justice,* HEANEY and WEBSTER, Circuit Judges.

Order

Revise the first full paragraph on page 4 of the above-styled opinion, filed April 20, 1977, to read as follows:

> While the Secretary's expert medical testimony agreed with that of the Company as to the general population, it went on to show that the aging process occurs more slowly

* TOM C. CLARK, Associate Justice, Retired, United States Supreme Court, sitting by designation.

> and to a lesser degree among professional pilots. The evidence was, in our judgment, insufficient to support an inference of diminished ability among pilots of the age of Houghton to adequately perform their work.

Strike the following language beginning with the third line from the top of page 6 of the opinion:

> On the contrary, it was shown that medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy. Furthermore, since only one percent of all airplane accidents are traceable to medical problems, and the vast percentage of these being nonage related, it follows that the likelihood of disability simply by age is highly remote.

and revise the next sentence of the same paragraph to read as follows:

> The record reflects that the safety record of the older pilots, within the sample studied, is better than that of the younger ones due to their experience.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

76-1652

Phillip W. Houghton,
Appellant,
William J. Usery, Jr.,
Secretary of Labor,
Plaintiff-Intervenor,
v.
McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 1, 1977

Supreme Court, U. S.
FILED
OCT 28 1977
MICHAEL RODAK, JR., CLERK

No. 77-309

In the Supreme Court of the United States

OCTOBER TERM, 1977

MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

PHILLIP W. HOUGHTON AND RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
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In the Supreme Court of the United States

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PHILLIP W. HOUGHTON AND RAY MARSHALL,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. A-21 to A-26, A-28 to A-29), is reported at 553 F. 2d 561. The opinion of the district court (Pet. App. A-1 to A-20) is reported at 413 F. Supp. 1230.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1977 (Pet. App. A-27), and a petition for rehearing was denied on June 1, 1977, at which time an order was entered revising two paragraphs of the

court's opinion (Pet. App. A–28 to A–30). The petition for a writ of certiorari was filed on August 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the record did not support petitioner's claim that age was a bona fide occupational qualification which justified its removal of a production test pilot from flight status at age 52.

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 81 Stat. 603, 29 U.S.C. 623, in pertinent part, provides:

> (a) It shall be unlawful for an employer—
> (1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; * * *
>
> * * * * *
>
> (f) It shall not be unlawful for an employer * * *—
> (1) to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> * * * * *
>
> (3) to discharge or otherwise discipline an individual for good cause.

STATEMENT

Respondent Phillip Houghton was Chief Production Test Pilot for petitioner. He was removed from flight status at age 52 and discharged one year later after refusing to accept another position with petitioner. Houghton brought suit in the United States District Court for the Eastern District of Missouri to enjoin petitioner from violating the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. 621 *et seq.* (hereinafter the "Act"), and to obtain reinstatement and monetary relief. The Secretary of Labor intervened as a party plaintiff, requesting injunctive relief. Petitioner, although admitting that it removed Houghton from flight status because of his age, denied any violation of the Act, claiming that its action was justified by the "bona fide occupational qualification" exception contained in Section 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), and that its subsequent termination of Houghton was "for good cause" and thus within the exception provided by Section 4(f)(3) of the Act.

The district court sustained both of these defenses. The court of appeals reversed, holding that there was no evidence to support petitioner's "bona fide occu-

pational qualification" ("BFOQ") defense (Pet. App. A–22, A–25) and that the "motivating cause" for Houghton's termination "was his insistence upon his statutory rights" (Pet. App. A–26).

1. Petitioner manufactures high performance military aircraft for the United States and other countries (Pet. App. A–2, Fdg. 4; A. 601[1]). It employs approximately 15 test pilots, who are classified as production test pilots, engineering test pilots and experimental test pilots (Pet. App. A–3, Fdg. 9; A. 1469). These pilots are closely monitored, *e.g.*, they are examined twice yearly by petitioner's doctor who is a specialist in aerospace medicine (Dep. of Dr. Womack, pp. 5, 9, 11, 13–14), and they are given two flight checks annually by an Air Force-approved flight supervisor who flies with the pilot and checks his handling of the aircraft and of simulated flight emergencies (A. 1121–1122, 1365–1368, 1412–1413, 1434, 1455–1456, 1517–1520). The pilots also participate in a debriefing immediately after each flight, at which time they are observed and questioned extensively (A. 46, 59–60, 163–164, 1472, 1573).[2]

Respondent Houghton was first employed by petitioner in 1946 and worked as a test pilot and chief production test pilot from 1951 to December 1971 (A. 33–37, 44–45, 52–56, 79–81). According to petitioner's

[1] "A." and "Dep." refer to the appendix and depositions, respectively, filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court. "Fdg." refers to the district court's Findings of Fact (Pet. App. A–2 to A–13).

[2] A production test flight usually takes an hour and 15 minutes (A. 64–65) and each pilot averages 13 flights per month (Plaintiff's Exh. 92).

own doctor, Houghton was in good health and was medically qualified to fly high performance aircraft at the time of his removal from flight status (Dep. of Womack, pp. 5, 13–14). He was a highly skilled pilot (A. 637, 645). Indeed, petitioner's other test pilots, who had flown with Houghton on numerous occasions, uniformly testified that he was an outstanding production test pilot, that there had not been any decrease in his proficiency or capability and that any such decrease would have been apparent from the manner in which he performed such difficult tasks as in-flight fueling, maintaining air speed, making appoaches and operating under instruments—all of which Houghton did extremely well (A. 1407–1408, 1436, 1457; Dep. of Behm, pp. 23–24; Dep. of Garrison, p. 27; Dep. of Dobronski, p. 183).

Petitioner, although asserting its "intuitive" judgment that older pilots represent a greater safety risk and should be removed before that risk becomes unacceptable (A. 648; see also 614–615, 623, 629–630, 645–647), admitted that it removed Houghton when it did because it was forced to reduce its staff of test pilots (A. 629–631). In addition to Houghton, who was 52, petitioner also removed the next two oldest pilots, who were 48 and 46 years old (A. 70–73, 77–78, 80–81, 84, 232, 234, 630, 1469).

Petitioner's judgment that experienced test pilots become a safety risk at about age 50[3] was not based on any objective study or standard industry practice; nor was it predicated on any discussion with peti-

[3] At the time of trial, petitioner had two 47-year-old test pilots on its staff (A. 403–404).

tioner's own medical specialist or with any other expert in the field of aerospace medicine or medicine generally (A. 646–647, 650; Dep. of Womack, p. 26).[4] Significantly, Air Force regulations do not specify age as a factor in qualifying pilots for these aircraft (A. 663–664, 666–669, 674).[5] There was also testimony that pilots in their 50's were permitted to fly high performance aircraft in the armed services and with NASA (A. 978–980, 988–989, 1086–1087, 1355–1356). At the time of trial there were 178 Air Force pilots age 50 or older flying single-piloted military aircraft (A. 1033–1036, 1044–1050).

The only evidence offered by petitioner in support of its BFOQ defense was the testimony of Dr. Alexander Lind and Dr. Thomas Frawley. While neither of these doctors had any experience in aerospace medicine (A. 343, 513, 519, 521, 540–541), both testified that in their opinion age is a bona fide occupational qualification for production test pilots (A. 481–487, 491–492, 496, 498, 539, 292–295, 300, 306, 308). These opinions, however, were based on the physiological and psychological changes which accompany the aging process in the general population (A. 268–271 274, 278, 282, 284–285, 294, 488–490, 495), and not

[4] Insofar as the record shows, the sole basis for petitioner's action, other than its need to reduce staff, was the experience of its vice president that he became more fatigued when flying as he got older (A. 616). While petitioner correctly states that its vice president grounded himself at age 44 (Pet. 4, n. 1), he testified that he did so because of the demands of his job and not because of age (A. 598, 606–607).

[5] The Air Force owns the planes manufactured by petitioner and its Chief of Flight Operations at petitioner's plant must approve each pilot before he may test fly an airplane (A. 663–664, 668).

on any specific data concerning professional pilots.

In response to this general medical testimony, the respondents called three doctors who were specialists in the field of aerospace medicine, had observed and studied pilots both in the laboratory and under flight conditions, and were familiar with the duties and demands of their jobs (A. 701–709, 722–724, 1308, 1310, 1062–1063, 1065, 1088–1089): Dr. Robert Proper, a specialist in gerontology, internal and aerospace medicine (A. 703–705, 707); Dr. Stanley Mohler, Chief of the Aeromedical Application Division at FAA's Office of Aviation Medicine (A. 1055, 1058–1061); and Dr. Charles A. Berry, formerly Chief of Flight Medicine for the U.S. Air Force and now president of the University of Texas Health Science Center and Chief of Flight Medicine for the NASA Spacecraft Center, where he is responsible for selecting and certifying the medical fitness of astronauts (A. 1305–1309; Plaintiff's Exh. 89). According to their testimony, which was specifically directed to the pilot population, the physiological and psychological changes described by petitioner's two experts occur much more slowly and to a lesser degree in professional aviators than in the population generally, and, as a result, the physiological and psychological differences between pilots in their 20's and 60's do not, absent some disease, impair the ability of the older pilots.[6]

[6] Dr. Proper was the chief investigator in an 11-year study of 503 professional aviators, 63 of whom were test pilots (A. 718–721). This study showed that pilots did not experience the physical changes that Dr. Lind assumed would plague older pilots, based on his knowledge of the general population. There was, for example,

All three specialists testified that age was not a bona fide occupational qualification, that many pilots can and do perform competently and safely in their 50's and 60's and that there is no objective basis for concluding that production test pilots over age 50, medically qualified and performing well, are less able than younger pilots to meet the physiological and psychological demands of their job (A. 840–842, 1170–1171, 1194, 1196, 1324–1327, 890, 924).

This medical testimony is confirmed by statistical data showing that although the accident rate of student and private pilots (who have general population characteristics) increases with age (see Pet. 7), the accident rate of professional aviators *decreases* and is less for the 45–59 and 60–74 year-old age groups than it is for the 16–29 and 30–44 year-old age groups (A. 375, 1499–1505). The Director of Aerospace Safety for the Air Force confirmed that older pilots have a better safety record (A. 992–993). Petitioner has had nine test pilot fatalities; all of the pilots have been under age 40 (A. 1383–1384).

Petitioner's other basis for advocating an age limit is that the possibility of heart attacks and strokes increases with age (A. 296–298, 302, 1575).[7] Heart attacks and strokes, however, are not caused by age itself but are the result of a disease process (A. 1113–1114) and, as petitioner's experts both acknowledged, the presence or absence of identifiable risk factors is a better indicator of possible heart problems than age (A. 356; see also Dr. Mohler, A. 1111). Drs. Mohler, Proper and Berry testified that the presence of these risk factors and the probability of a heart attack or stroke can be determined with a high degree of accuracy through the use of certain available and relatively inexpensive medical tests (A. 836, 839–840, 871, 874, 897, 901, 1083–1085, 1201, 1330, 1345, 1353). These witnesses also stated that the medical and performance tests currently in existence—and not age—provide the only reliable basis, when dealing with a small population of pilots, for identifying potentially unsafe pilots. Moreover, less than one percent of all aircraft accidents are caused by medical factors (A. 1117, 1156) and, of these, only a very small percent is caused by heart attack or stroke (A. 1128). It was undisputed that the major cause of accidents is pilot error and that older pilots are likely to have more experience and better judgment (A. 992–993).

On the basis of this record, the district court found that the "risk of sudden incapacitation * * * increases with age, but cannot be predicted with any accuracy"; that petitioner "had reasonable cause, in light of the expert testimony adduced at trial by all parties, to

almost no change in reaction time, circulation, stroke volume, blood pressure at rest, cardiovascular functions, work capacity or grip strength for older pilots, although there was a substantial change in the general population (A. 726, 728–729, 743, 749, 774, 776, 789, 796–798).

[7] Although petitioner states that "the risk of sudden incapacitation also increases with age" (Pet. 6), the evidence was undisputed that the only increase was in heart attacks and strokes and that other kinds of incapacitation—including gastroenteritis, which is the most common cause of incapacitation during flight—do not increase with age (A. 820, 1104, 1349).

believe that [respondent] Houghton, at age 52, would not be able to perform safely and efficiently the duties of a production test pilot"; and that "age is a bona fide occupational qualification for the job of production test pilot" (Pet. App. A–12 to A–13, Fdg. 49, 54, 55).

The court of appeals reversed, holding that these findings were "clearly erroneous" (Pet. App. A–25). In reaching this result, the court stated (Pet. App. A–28 to A–29):

> While the [respondents'] expert medical testimony agreed with that of the [petitioner] as to the general population, it went on to show that the aging process occurs more slowly and to a lesser degree among professional pilots. The evidence was, in our judgment, insufficient to support an inference of diminished ability among pilots of the age of Houghton to adequately perform their work.

The court also noted that the "safety record of the older pilots, within the sample studied, is better than that of the younger ones" (Pet. App. A–29).

ARGUMENT

1. It is undisputed that Houghton was not removed from flight duties simply because he was considered too old to perform those duties; he was removed because economic conditions forced petitioner to cut back its staff pilots and it chose to lay off Houghton because he was the oldest pilot on duty (Pet. App. A–7 to A–8, Fdg. 27, 30–33).[8] There was no evidence

[8] The other two pilots removed from flight status were the next two oldest pilots on duty. See page 5, *supra*. While a vice-president

that Houghton's performance as a pilot had deteriorated prior to his removal from flight status—or even that he would have been removed from flight duty in the absence of the cutback. Petitioner's action is precisely the type of discrimination that the Act forbids. See Section 4(a)(1), 29 U.S.C. 623(a)(1).

2. Contrary to petitioner's assertion (Pet. 12–14), the court of appeals in ruling on petitioner's BFOQ defense did not depart from the principles enunciated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 236 (C.A. 5), and *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 863 (C.A. 7).[9] It simply determined, on the basis of the record before it, that petitioner had failed to meet the burden of proof established by these decisions.

Under these decisions, an employer, in order to sustain a BFOQ defense, must demonstrate that the employment of older workers represents an increased safety risk (*Hodgson* v. *Greyhound Lines, Inc., supra,* 499 F. 2d at 863; *Usery* v. *Tamiami Trail Tours, Inc., supra,* 531 F. 2d at 236) or that the safety endangering characteristics of older workers cannot practically be ascertained (*Tamiami Trail Tours, supra*). The

of petitioner testified that he had discussed with Houghton over several years the fact that Houghton "couldn't fly forever" (A. 609), he testified that the staff reduction "was the final thing that convinced me" to remove Houghton (A. 608, 629).

[9] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, is not in point. The issue in that case was not whether the employer had established that age was a bona fide occupational requirement for certain police work, but whether the state could, under the rational basis test of the Fourteenth Amendment, set arbitrary age limits for retirement.

court below applied this standard (Pet. App. A–24 to A–25):

> This burden includes a showing that the Company has a factual basis for believing that substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the pilot's age.

Here, the testimonial and statistical data, unlike that in *Greyhound* and *Tamiami,* showed that, among professional pilots, the older pilots have a *lower* accident rate than the younger pilots. The data also showed, unlike *Greyhound* and *Tamiami,* that the psychological and physiological changes which occur as part of the aging process occur in pilots more slowly than in the general population and do not occur in a sufficient degree to affect adversely the performance or productivity of test pilots and other professional aviators of petitioner's age.

The district court's contrary conclusion was based on "clearly erroneous" findings (Pet. App. A–25) which, the court of appeals held, disregarded "th[e] mountain of evidence against the [petitioner's] position" (Pet. App. A–24). This essentially factual holding does not warrant this Court's review.

3. Petitioner's contention (Pet. 16–17) that the decision below will encourage malingering is premature. The court of appeals, remanding the case, expressed

no view of the petitioner's allegations relating to mitigation, stating only that Houghton should be "awarded such damages as he has suffered by reason of his discharge" and that the district court, "[i]n calculating damages, * * * should appropriately consider the substantially lesser salary Houghton would have earned in the position offered him by the [petitioner]" (Pet. App. A–26). This statement clearly contemplates that the district court will consider evidence regarding mitigation. Any evidence in support of petitioner's charges of malingering may be presented to the district court on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1977.

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